Supreme Court, U. S.
FILED
DEC 28 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-924

LEWIS T. KENT,

Petitioner,

vs.

THE STATE OF OHIO

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS, FIRST DISTRICT

H. LOUIS SIRKIN,
105 West 4th Street - Suite 832
Cincinnati, Ohio 45202
Attorney for Petitioner,

and

MARTIN S. PINALES,
105 West 4th Street - Suite 832
Cincinnati, Ohio 45202
Of Counsel

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

SUBJECT INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS & RULES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	3
I. The decision of the Court of Appeals of the First Appellate District of Ohio violates the due process clause of the Fifth Amendment of the United States Constitution in that Rule 11 (A) and 11 (B) of the Ohio Rules of Criminal Procedure violate fundamental fairness	3
II. The sentence received by Petitioner of from one to five years in the Ohio Penitentiary violates the Eighth Amendment of the United States Constitution	4
CONCLUSION	5
APPENDIX A (OPINION BELOW)	1a-6a
APPENDIX B (CONSTITUTIONAL PROVISIONS & RULES)	7a-11a

TABLE OF AUTHORITIES CITED

Cases:	Page
In re Murchison, 349 U.S. 133	4
MacKenna v. Ellis, 280 F. 2d 592	4
Irvin v. Dowd, 366 U.S. 717	4
Weems v. United States, 217 U.S. 349	5

Rules:

Rule 11 (A) and 11 (B) – Ohio Rules of Criminal Procedure	3, 4

Constitutional Provisions:

Fifth Amendment to the United States Constitution	3
Eighth Amendment to the United States Constitution	4

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. ————

LEWIS T. KENT,

Petitioner,

vs.

THE STATE OF OHIO

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS, FIRST DISTRICT

PETITION FOR CERTIORARI

The Petitioner, Lewis T. Kent, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals, First Appellate District, Hamilton County, Ohio, and dismissal of the appeal from the Ohio Supreme Court and denial for rehearing on September 29, 1977.

OPINION BELOW

The opinion of the Court of Appeals of the First Appellate District appears as Appendix A. No opinion was rendered by the Supreme Court of Ohio.

JURISDICTION

The judgment of the First Appellate District of Ohio was entered on May 18, 1977, affirming Petitioner's conviction in the Court of Common Pleas of Hamilton County, Ohio. On September 9, 1977, the Ohio Supreme Court dismissed the appeal and on September 29, 1977, the Ohio Supreme Court denied Petitioner's motion for rehearing.

The jurisdiction of this Court is invoked pursuant 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether Rule 11A and Rule 11B of the Ohio Rules of Criminal Procedure violate the due process clause of the Fifth Amendment to the United States Constitution.

2. Whether the sentence imposed on Petitioner for the crime charged is excessive and violates the Eighth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS & RULES INVOLVED

The constitutional provisions and rules involved are the following, all of which are set forth in Appendix B herein:
United States Constitution, Fifth Amendment;
United States Constitution, Eighth Amendment; and
Rule 11A & B, Ohio Rules of Criminal Procedure.

STATEMENT OF THE CASE

On April 14, 1975, an indictment was returned by the Hamilton County Grand Jury under Case No. B-751323 against Petitioner charging him with Receiving Stolen Goods in violation of Ohio Revised Code Section 2913.51.

The cause came on for hearing on February 10, 1976, in the Court of Common Pleas of Hamilton County, Ohio. The Petitioner entered a plea of No Contest, which was accepted by the trial court. Thereupon, the prosecutor made a statement of his facts, and the defendant made a statement of his facts. A finding of Guilty was rendered and Petitioner was sentenced to from one (1) to five (5) years in the Ohio Penitentiary.

An appeal to the First Appellate District of Ohio affirmed the decision of the trial court. The Ohio Supreme Court dismissed the appeal on September 9, 1977, and denied rehearing on September 29, 1977.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Court of Appeals of the First Appellate District of Ohio Violates the Due Process Clause of the Fifth Amendment to the United States Constitution in that Rule 11A and Rule 11B of the Ohio Rules of Criminal Procedure Violate Fundamental Fairness.

It is essential that state rules of criminal procedure do not violate a defendant's right to fairness and due process. Rules 11A and 11B of the Ohio Rules of Criminal Procedure allow a prosecutor to have accepted all statements as absolute, but do not afford a defendant the same priv-

ilege. Due process requires fundamental fairness. *In re Murchison,* 349 U.S. 133 (1955).

It is a basic right that a defendant in a criminal case has a fair opportunity to tell his story in a fair trial. *MacKenna* v. *Ellis,* 280 F. 2d 592. Rule 11B of the Ohio Rules of Criminal Procedure makes no provision to afford a defendant this opportunity. While a defendant who enters a plea of no contest gives up his right to a trial, he should still be entitled to give his side of the facts, and have his statements given the same weight as those of the prosecutor. The failure to afford a fair hearing violates the standards of due process. *Irvin* v. *Dowd,* 366 U.S. 717 (1961). Any rule which allows a plea of no contest to be equated to a plea of guilty by not providing the defendant the opportunity to be heard does not meet even minimal standards of due process. Rule 11B(3) even goes one step further by stating that the "Court shall . . . proceed with sentencing . . . ." upon acceptance.

II.

The Sentence Received by Petitioner of From One to Five Years in the Ohio Penitentiary Violates the Eighth Amendment of the United States Constitution.

The Petitioner was sixty-five (65) years of age at the time the trial court entered its sentence. Further, the record discloses that the Petitioner had no previous record, was in ill health, and was not involved in a crime of violence. Generally, the duration of sentence is not traditionally looked upon as cruel and unusual punishment. However, when the duration of a sentence is so disproportionate to the offense committed, as to shock the moral sense of the community, the punishment is prohibited by the

Eighth Amendment to the United States Constitution. *Weems* v. *United States,* 217 U.S. 349.

The trial court at the time of sentencing even made reference to a member of Petitioner's "family who was involved in the same situation." (T 14) The same court granted probation to Petitioner's brother, who was indicted at the same time for the same offense, with the same background.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the First Appellate District of the State of Ohio and the denial of the Ohio Supreme Court.

Respectfully submitted,

H. LOUIS SIRKIN,
Attorney for Petitioner

and

MARTIN S. PINALES
Of Counsel

APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-76314

STATE OF OHIO,
Plaintiff-Appellee,

vs.

LEWIS T. KENT,
Defendant-Appellant.

MEMORANDUM DECISION AND JUDGMENT ENTRY

(Filed May 18, 1977)

Messrs. Simon L. Leis, Jr., William E. Breyer and Carl W. Vollman, 420 Hamilton County Court House, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Martin S. Pinales, 105 West 4th Street, Suite 832, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

Now, therefore, the assignment of error having been fully considered is accordingly passed upon in conformity with App. R. 12 (A) as follows:

On April 14, 1975 the defendant-appellant was indicted under a two-count indictment charging in each count "receiving stolen property." On the date of trial, the appellant entered a plea of no contest to each count of the indictment, and the prosecutor made a statement of the facts to the court setting forth the elements that could have been proven as to each count. The appellant's counsel was then permitted by the trial court to make a statement of the defendant's version of the facts. The court then made a finding of guilty as charged as to each count and subsequently the court pronounced sentence in accordance with law as is reflected by the record. It is from this finding and sentence that the defendant-appellant brings his appeal to this Court.

The defendant-Appellant urges one assignment of error that being:

> "The finding of guilty by the trial court is contrary to law and manifestly against the weight of the evidence."

The principle thrust of the defendant-appellant's contention is that: "On a plea of no contest the trial court must consider all statements, and where a full explanation of the facts and circumstances causes the State to fail to show one of the elements of the crime charged, the trial court must find for the defendant."

The defendant-appellant seems to argue that where a plea of no contest is entered and the trial court permits the defendant or his counsel to make a statement as to the facts, the court must accept as true that factual statement as made. We disagree. The record in this case reveals

that the statement of facts given by the prosecutor is such as to establish each essential element of the crime charged. Moreover, Crim. R. 11 (B) provides in its pertinent part as follows:

> "B. The plea of no contest is not an admission of defendant's guilt *but is an admission of the truth of the facts alleged in the indictment . . .*" (Emphasis added).

Given the statement of the facts by the prosecutor and the provisions of Crim R. 11 as pointed out above, we find that the assignment of error is without merit and therefore overruled.

The assignment of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

PALMER, P. J., CASTLE and BLACK, J. J.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1977 TERM
City of Columbus.) To wit: September 9, 1977

No. 77-646

STATE OF OHIO,

Appellee,

vs.

LEWIS T. KENT,

Appellant.

APPEAL FROM THE COURT OF APPEALS
for Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copies from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....

.....Clerk

.....Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1977 TERM
City of Columbus.) To wit: September 9, 1977

No. 77-646

STATE OF OHIO,

Appellee,

vs.

LEWIS T. KENT,

Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS
for Hamilton County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Martin S. Pinales.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copies from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....

.....Clerk

.....Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,) 1977 TERM
City of Columbus.) To wit: September 29, 1977

No. 77-646

STATE OF OHIO,

Appellee,

vs.

LEWIS T. KENT,

Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copies from the records of said Court, to wit, from Journal No. .... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court.
this ..... day of ..... 19 ....

..... Clerk.

By ..... Deputy.

APPENDIX B

CONSTITUTIONAL PROVISIONS AND RULES

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Rule 11, Ohio Rules of Criminal Procedure:

RULE 11. Pleas, Rights Upon Plea

(A) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or his attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court shall, except as provided in subsections (C) (3) and (4), proceed with sentencing under Rule 32.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, or pursuant to Rule 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and

that the court upon acceptance of the plea may proceed with judgment and sentence.

(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

(3) Until January 1, 1974, where a defendant pleads guilty or no contest to a capital offense a court composed of three judges shall examine the witnesses, determine the degree of crime and pronounce sentence accordingly. In all other cases the court need not take testimony upon a plea of guilty or no contest.

(4) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no

contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing him of the effect of the pleas of guilty, no contest, and not guilty and determining that he is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, or pursuant to Rule 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses. In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of Rule 44 (B) and (C) apply to this subdivision.

(F) Negotiated plea in felony cases. When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea. If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity. The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial. A defendant who does not plead not guilty by reason of insanity is conclusively presumed to have been sane at the time of the commission of the offense charged.

Supreme Court, U. S.
FILED
JAN 30 1978
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-924

LEWIS T. KENT,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

WILLIAM E. BREYER
Assistant Prosecuting Attorney

CARL W. VOLLMAN
Assistant Prosecuting Attorney
420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	Page
INTRODUCTION	1
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	4
REASONS FOR DENYING WRIT	5
CONCLUSION	9
APPENDIX "A"	1a

TABLE OF AUTHORITIES

Cases Cited: **Page**

Irvin v. *Dowd*, 366 U.S. 717 (1961) 6

McKenna v. *Ellis*, 280 F. 2d 592 6

Pennsylvania R. Co. v. *Illinois Brick Co.*, 297 U.S. 447 (1936) 5

State v. *Childs*, 14 O.S. 2d 56 (1968) 5

State v. *Phillips*, 27 O.S. 2d 294 (1971) 5

Weems v. *United States*, 217 U.S. 349 (1910) 8

Constitutional Provisions Cited:

Fifth Amendment, United States Constitution 3, 6

Eighth Amendment, United States Constitution ... 3

28 U.S.C. 1257 (3) 2, 3

Rules Cited:

Rule 11 (A) – Ohio Rules of Criminal Procedure 3, 6, 9

Rule 11 (B) – Ohio Rules of Criminal Procedure 3, 6, 9

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-924

LEWIS T. KENT,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner is attempting to raise questions in this Court which were never presented to any Ohio Court. It is an appellate rule of long standing that matters which have not been raised and litigated in the lower courts may not be raised in the appellate court. Further, petitioner has stated no jurisdictional basis for this Court to consider his second Question Presented. For these reasons a writ should not be issued in this matter.

OPINIONS BELOW

The petition of the petitioner correctly sets forth the opinions of the Ohio Courts.

JURISDICTION

Petitioner has claimed jurisdiction pursuant to 28 U.S.C. 1257 (3). That statute reads in pertinent part as follows:

> "Section 1257. State Courts; appeal; certiorari.
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By writ of certiorari . . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . ."

This statute does give the Court jurisdiction over the first question petitioner raises, which challenges the constitutionality of an Ohio Statute. However, it does not give this Court jurisdiction to consider the second question presented by petitioner. That question, no matter how petitioner frames it, says in essence that the trial court abused its discretion in sentencing the defendant to a term of one to five years on a receiving stolen goods charge. 28 U.S.C. 1257 (3) does not give this Court jurisdiction to consider the second question presented by petitioner. It is submitted that this Court does not have jurisdiction to consider this question.

QUESTIONS PRESENTED

1. WHETHER THE SUPREME COURT WILL ISSUE A WRIT OF CERTIORARI TO A STATE COURT IN ORDER TO CONSIDER ISSUES WHICH WERE NEVER PRESENTED TO THE STATE COURT.
2. WHETHER RULE 11A and RULE 11B OF THE OHIO RULES OF CRIMINAL PROCEDURE, WHICH ALLOW A DEFENDANT TO VOLUNTARILY ENTER ANY ONE OF THREE POSSIBLE PLEAS, ARE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
3. WHETHER A STATE TRIAL COURT ABUSES ITS DISCRETION IN SENTENCING A DEFENDANT TO A TERM OF ONE TO FIVE YEARS IN PRISON ON A CONVICTION FOR RECEIVING STOLEN PROPERTY.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions, federal statutes, and state rules which are involved are as follows, and are contained in Appendix A herein.

United States Constitution, Fifth Amendment
United States Constitution, Eighth Amendment
28 U.S.C. Section 1257 (3)
Ohio Criminal Rule 11 A and Rule 11 B

STATEMENT OF THE CASE

Defendant-petitioner was indicted by the Hamilton County, Ohio, Grand Jury on April 14, 1975. The indictment was numbered B-751323 and charged petitioner with two counts of Receiving Stolen Property. Defendant was arraigned on April 16, 1975, and entered a plea of not guilty and was released on bond.

On February 10, 1976, the defendant entered a plea of no contest to each count of the indictment and a finding of Guilty as to each count was entered. After a probation investigation was conducted a sentencing hearing was held. Sentences of one to five years were imposed on each count and were made to run concurrently. Defendants conviction was affirmed by the Ohio First District Court of Appeals on May 18, 1977. Defendants appeal to the Ohio Supreme Court was dismissed on September 9, 1977, and that Court denied a motion for rehearing on September 29, 1977.

REASONS FOR DENYING WRIT

I

THE UNITED STATES SUPREME COURT WILL NOT ISSUE A WRIT OF CERTIORARI TO A STATE COURT TO CONSIDER ISSUES WHICH WERE NEVER PRESENTED TO OR CONSIDERED BY THE STATE COURT.

Neither of the two questions presented by this petitioner were presented to the trial court, to the Ohio Court of Appeals or to the Ohio Supreme Court. These questions are now being raised for the first time in the United States Supreme Court. It is a well established rule of appellate procedure in Ohio that issues that are not preserved in the lower Courts cannot be raised on appeal. This rule applies as well to constitutional issues. *State* v. *Childs*, 14 O.S. 2d 56 (1968) and *State* v. *Phillips*, 27 O.S. 2d 294 (1971). The United States Supreme Court respects this rule of appellate procedure and will not issue a writ to consider questions which were not presented to the state courts. In *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447 (1936) the United States Supreme Court stated as follows:

> "As the highest court of the state declined to consider them because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them." (citations omitted)

As petitioner raised neither of the issues he is currently presenting in the lower courts, he is precluded from raising them in this Court.

II

RULE 11(A) AND RULE 11(B) OF THE OHIO RULES OF CRIMINAL PROCEDURE, WHICH ALLOW A DEFENDANT TO VOLUNTARILY ENTER ANY ONE OF THE THREE POSSIBLE PLEAS, ARE NOT VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Defendant contends that the Ohio Criminal Rules, with regard to a plea of no contest, are constitutionally defective. In Ohio a no contest plea is an admission of the truth of the facts alleged in the indictments, but is not an admission of guilt. The essential significance of the no contest plea is that the admission of facts may not be used against the defendant in any subsequent civil or criminal proceeding. This is the purpose of the no contest plea. Defendant may also enter pleas' of guilty or of not guilty. The choice of which plea to enter is a voluntary matter for the defendant.

Defendant contends in his brief that the entry of a no-contest plea prevents him from telling his side of the story. Defendant cites to the cases of *McKenna* v. *Ellis,* 280 F. 2d 592 and *Irvin* v. *Dowd,* 366 U.S. 717 (1961) as standing for the proposition that a defendant in a criminal trial is entitled to a fair trial. This proposition is undoubtedly correct. However, the important point here is that defendant has voluntarily entered a plea of no-contest, thereby waiving his right to trial. Defendant has suffered no deprivation of Due Process because of this procedure.

III

A TRIAL COURT DOES NOT ABUSE ITS DISCRETION IN SENTENCING A CRIMINAL DEFENDANT TO A TERM OF ONE TO FIVE YEARS ON A CONVICTION ON TWO COUNTS OF RECEIVING STOLEN PROPERTY.

It is the position of respondent that this Court does not have jurisdiction to consider this question presented by petitioner. The reasons therefore are set out in the jurisdictional statement and will not be repeated. However, if the court should care to consider this issue it is the feeling of respondent that the claim of cruel and unusual punishment raised by petitioner is facially devoid of merit.

Petitioner was convicted of two counts of Receiving Stolen Property and was sentenced to a term of one to five years in prison. This sentence is well within the limits provided by Ohio law and is not even the maximum penalty permitted. It is hard to believe that petitioner would seriously advance a claim of cruel and unusual punishment based on these facts.

An examination of the record in this matter reveals that petitioner, himself the owner of an optical company, was the kingpin in a theft ring specializing in optical burglaries in the Midwest in 1973 and 1974. Petitioner Kent was in contact with known burglars and thieves. Petitioner would come to these men and advise them of his need for certain types of expensive optical equipment. These men would then go out and burglarize optical outlets and steal machines, reselling them to petitioner for a fraction of true value.

On August 2, 1973, a burglary at an optical office in Columbus, Ohio, resulted in a loss of $30,000 in optical

equipment. The thieves sold some of the material, including a 'diamond-edger' (a cutting and grinding tool) to petitioner for about $400. The true value was in excess of $2000. Petitioner had purchased numerous items of stolen property in the past from these same burglars.

On August 25, 1974, an optical laboratory in Roanoke, Virginia, was burglarized and equipment valued at $14,500 was stolen. The thieves sold part of this merchandise, a diamond edger worth in excess of $2000 to petitioner for about $400. This equipment, along with the previously mentioned edger, was recovered while in petitioner's possession. Investigation revealed that petitioner was extensively involved in stolen optical equipment sales for a period of some years. In effect petitioner was operating a stolen property and theft ring which spread its' tentacles into several midwestern states.

In view of the factual background involved here petitioner is fortunate to be facing only a mild term in a state prison. Petitioner could very easily have been charged with various federal crimes and be facing a much stiffer term in a federal prison.

A punishment is said to be 'cruel and unusual' when it is grossly disproportionate to the offense and shocks the conscience of the community. *Weems* v. *United States,* 217 U.S. 349 (1910). The term of one to five years clearly does not offend this standard and is certainly not an abuse of discretion by the trial court, which is the real question presented by petitioner on these facts.

CONCLUSION

Respondent respectfully submits that the petition for a Writ of Certiorari should be denied for the following reasons:

1. This Court does not have jurisdiction to consider the second question presented by petitioner.
2. Petitioner has raised neither of the questions he now presents in the State Courts. Therefore this Court will not consider them.
3. Petitioner has not demonstrated that Ohio Criminal Rules 11 (A) and 11 (B) are violative of the Due Process Clause.
4. A sentence of one to five years for two counts of Receiving Stolen Property does not amount to cruel and unusual punishment.

For these reasons the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

WILLIAM E. BREYER
Assistant Prosecuting Attorney

CARL W. VOLLMAN
Assistant Prosecuting Attorney

APPENDIX "A"

United States Constitution, Fifth Amendment:

"No person shall be . . . deprived of life, liberty or property without due process of law; . . ."

United States Constitution, Eighth Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

28 U.S.C. Section 1257 (3) :

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By Writ of Certiorari . . . where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution . . . or where any title, right, privilege or immunity is specifically set up or claimed under the constitution . . ."

Ohio Criminal Rule 11:

" (A) Pleas

A defendant may plead not guilty, not guilty by reason of insanity, guilty, or with the consent of the court, no contest.

. . .

(B) (2) The plea of no contest is not an admission of the defendants guilt, but is an admission of the truth of the facts alleged in the indictment . . . ."